

STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Complainant,

and

DAVID IGE, Governor, State of Hawai‘i;
ELIZABETH CHAR, Director of Health,
Department of Health, State of Hawai‘i,

Respondents.

CASE NO(S). 20-CE-10-953

ORDER NO. 3673

PRETRIAL ORDER AND NOTICES

- (1) NOTICE TO RESPONDENT(S) OF PROHIBITED PRACTICE COMPLAINT;
- (2) NOTICE TO PARTIES OF EXTRAORDINARY CIRCUMSTANCES
- (3) NOTICE OF FILING REQUIREMENTS;
- (4) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS;
- (5) NOTICE OF STRUCTURE FOR REMOTE HEARINGS BEFORE THE BOARD
- (6) NOTICE OF PREHEARING CONFERENCE
- (7) NOTICE OF PRETRIAL CONFERENCE
- (8) NOTICE OF WITNESS REQUIREMENTS WHILE TESTIFYING REMOTELY
- (9) NOTICE OF HEARING ON THE MERITS; AND
- (10) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES

PRETRIAL ORDER AND NOTICES

THE PARTIES ARE HEREBY NOTIFIED AND ORDERED TO COMPLY WITH THIS PRETRIAL ORDER AND NOTICES. The Hawai'i Labor Relations Board (Board) may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this Pretrial Order and Notice if the parties or attorneys have not shown good cause for failure to comply or a good faith effort to comply.

This document controls the course of proceedings and may not be amended except by the Board through an Order or Notice, by a written request by a party with written consent of all the parties (stipulation), or by an order granting a motion filed with the Board. The use of singular, plural, masculine, feminine, and neuter pronouns include the others as the context may require.

(1) NOTICE TO RESPONDENTS OF A PROHIBITED PRACTICE COMPLAINT

The attached prohibited practice complaint (Complaint) was filed with the Board by the above-named Complainant(s) on: **December 3, 2020**.

PURSUANT TO HAWAII REVIS'D STATUTES (HRS) § 377-9(b) AND HAWAII ADMINISTRATIVE RULES (HAR) § 12-42-42: NOTICE IS HEREBY GIVEN TO RESPONDENT(S) that the above-named COMPLAINANT(S) filed a prohibited practice Complaint with the Board, a copy of which is attached, alleging that you have engaged in or are engaging in prohibited practices in violation of HRS Chapter 89.

YOU ARE DIRECTED to file a written answer to the Complaints within ten (10) days after service of the Complaints. One copy of the answer must be served on each party, and the original with certificate of service on all parties must be filed with the Board no later than 4:30 p.m. on the tenth day after service of the Complaint. If you fail to timely file and serve an answer, that failure constitutes an admission of the material facts alleged in the Complaint and a waiver of hearing. (HAR § 12-42-45(g))

(2) NOTICE OF EXTRAORDINARY CIRCUMSTANCES

Due to the current concerns regarding COVID-19, the Governor of the State of Hawai'i (Governor) issued a series of Emergency Proclamation, with the first being signed on March 5, 2020. These proclamations, among other things, gave agencies the ability to conduct certain hearings by telephone or video conference without the physical presence of the parties at the same location, and suspend certain rules, statutory requirements, and administrative hearing procedures as needed to deal with the emergency situation brought on by COVID-19.

Accordingly, the Board is holding remote, videographic hearings and is mandating electronic filing during the emergency period, unless terminated by separate proclamation, whichever occurs first. (See Order Nos. 3605 and 3647)

(3) NOTICE OF FILING REQUIREMENTS

1) Electronic Filing

All filings in this case must be made electronically through the Board's filing service FileandServeXpress (FSX). There is no charge to the parties for use of this electronic filing service. Should any party not have access to the Internet, or for any other concerns or complications, please contact the Board via electronic mail or (808) 586-8616.

To register, a party is required to complete and submit the Board Agreement to E-File (Form HLRB-25), as amended, which is available at <http://labor.hawaii.gov/hlrb/forms/>.

Questions regarding the Board's electronic filing system should be directed to the Board's staff at (808) 586-8616.

2) Filing Requirements Regarding Protection of Social Security Numbers and Personal Information

Before a party files or submits any pleading, correspondence, or other document (Documents) to the Board, whether electronically or manually, the party must make certain that all social security numbers and personal information are redacted or encrypted. "Personal information" includes social security numbers, home addresses, dates of birth, bank account numbers, medical and health records, and any other information in which a person has a significant privacy interest. To the extent any personal information is relevant to the Board's consideration of this case, the submitting party must submit the confidential information by means of a Confidential Information Form that substantially conforms to Form 2 of the Hawai'i Court Records Rules, as amended.

If a party submits a document that requires redaction of a page(s), the party must, by motion, request permission from the Board to withdraw and replace the original document, in its entirety, with a redacted copy of such document, pursuant to HAR § 12-42-8(g)(11), "The Board may permit withdrawal of original documents upon submission of properly authenticated copies to replace such document."

The Board may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this provision where the parties or attorneys have not shown good cause for failure to comply or a good faith attempt to comply.

(4) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS

All parties have the right to appear and to be represented by counsel or any other authorized person in all Board proceedings, subject to the Extraordinary Circumstances set forth in Section (2) above. Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai‘i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, including language access, please call the Board at (808) 586-8616, at least seven (7) days prior to a Board proceeding.

The parties should be aware that the Board is in a secured State of Hawai‘i building, which may not be accessible to the public during the emergency period referenced in the Notice of Receipt of Notice of Contest.

(5) NOTICE OF STRUCTURE FOR REMOTE HEARINGS BEFORE THE BOARD

The Board currently uses Zoom as its platform for online proceedings. The Board hereby orders all parties to follow the requirements laid out in this Order for all Remote Zoom Hearings before the Board.

Parties and representatives should familiarize themselves with Zoom in preparation for all online Board proceedings. For security purposes, the Board will utilize the “waiting room” function.

Prior to the hearing:

1. The Board will provide Zoom login information to the parties in advance of the hearing.
2. A party who shares the Zoom login information with any other group or individual (Sharing Party) must provide the Board and the other party/parties with a complete list of participants they have invited to attend the proceedings, including any support staff and witnesses. This list must be emailed to the Board at dlir.laborboard@hawaii.gov.
3. Any Sharing Party must inform non-witness participants:
 - 1) that they must keep their microphones muted at all times; and
 - 2) that they must keep their cameras off at all times.
4. Any Sharing Party must inform **all** participants:
 - 1) that they must submit their full name as their username when requesting entry to the Zoom conference, to allow the Board to ensure compliance with the witness exclusion rule, unless the party sets up a device specifically for witness use only, in which case that device may log in with the username “witness”; and

2) that they may not record, screen shot, record conversations, and/or use third party software to record the proceeding.

(6) NOTICE OF PREHEARING CONFERENCE

PURSUANT TO HRS § 89-5(i)(4) and (i)(5), and HAR § 12-42-47:

NOTICE IS HEREBY GIVEN that the Board will conduct a Prehearing Conference on the date listed below and in the Schedule of Deadlines and Hearing Dates (Schedule) in this document.

DATE AND TIME: December 22, 2020 at 10:00 a.m.

LOCATION: Remote Zoom Hearing

The purpose of the Prehearing Conference is to clarify the issues, if any; to the extent possible, to reach an agreement on facts, matters, or procedures that will facilitate and expedite the hearing or adjudication of the issues presented; to establish deadlines for prehearing briefing; to identify witnesses and file applications for the issuance of subpoenas; and for such other matters as may be raised.

All parties have the right to appear at the Prehearing Conference telephonically and to be represented by counsel or any other authorized person. Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai'i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, including language access, please call the Board at (808) 586-8616, at least seven (7) days prior to a Board proceeding.

(7) NOTICE OF PRETRIAL CONFERENCE

PURSUANT TO HRS §§ 89-5(i)(4) and (i)(5), and 377-9:

NOTICE IS HEREBY GIVEN that the Board will conduct a Pretrial Conference on the date listed below and in the Schedule in this document.

DATE AND TIME: January 5, 2021 at 9:00 a.m.

LOCATION: Remote Zoom Hearing

1) Pretrial Statement

Both the Complainant(s) and the Respondent(s) must file a Pretrial Statement with the Board as listed in the Schedule set forth below. The Pretrial Statement must include the following:

1. Statement of Issues
2. Witness List

The witness lists must include, in the interest of judicial economy, a brief but meaningful summary of the nature of the testimony expected, and the order in which the witnesses are expected to be called upon, subject to the witness' availability.

The summary for each witness must include sufficient information for the Board to determine whether the testimony will be irrelevant, immaterial, or unduly repetitious to any other witness testimony; see HRS § 91-10(1). The summary, therefore, must include sufficient information to show the Board that the testimony of each witness will be different, and so the summary for each witness must be individualized.

Failure to include individualized summaries for any witness may be grounds for the Board to strike that witness and not allow them to testify at the hearing on the merits.

The witness list must also include information regarding the location where the party expects the witness to testify from. This location may include the witness' home, a party's office, or any other location from which the witness can testify remotely, without assistance or interference from any other party, and can access the relevant exhibits.

If a party intends to file a request for a subpoena for a witness, that request must be concurrently filed with the Pretrial Statement, and a notation that a request is being made must be listed in the witness list.

3. Exhibit List

The exhibit lists must include copies of the proposed exhibits. The parties are required to use the File & ServeXpress eFiling system to file the exhibits before or by 4:30 p.m. (HST) on the deadline day, as ordered in Board Order No. 3605. The exhibits must be combined and filed in a searchable portable document format (PDF) not exceeding 10 megabytes, with each exhibit bookmarked.

If a party intends to file a request for a subpoena duces tecum for any of its exhibits, that request must be concurrently filed with the Pretrial Statement, and a notation that a request is being made must be listed in the exhibit list.

The Complainant must identify his exhibits using alphabetical letters (A, B, C, D, etc.). Union Respondent(s) must identify its exhibits using numerical designations preceded by U (e.g., U-1, U-2, U-3, etc.).

If there are any duplicative exhibits, the parties must designate them as Joint Exhibits, the parties must designate one party to file these exhibits, and the Exhibits must be marked with numerical designations preceded by J (e.g., J-1, J-2, J-3, etc.).

All Exhibits are to be bates-stamped in the upper right-hand corner.

Additionally, the Exclusive Representative, unless no Exclusive Representative is party to the case, in which case the Employer, must submit to the Board the full applicable collective bargaining agreement(s), including any Memoranda of Understanding, Memoranda of Agreement, or any other supplemental agreement that has any bearing on these proceedings. These documents must be marked as Board Exhibit 1 or Board Exhibit 1a, 1b, 1c, etc. and must be bates-stamped in the upper-right hand corner.

2) Pretrial Conference

At the pretrial conference, the Parties must be prepared to discuss, raise, and present their position regarding the presentation of the anticipated evidence (witnesses, exhibits) to be introduced at the Hearing on the Merits (HOM), including but not limited to any stipulations, evidentiary issues, objections, or confidentiality issues that require protection from public disclosure and the narrow tailoring of methods to protect that information (e.g. sealing or redaction).

While all parties have the right to appear at the Pretrial Conference and to be represented by counsel or any other authorized person, all parties are required to either appear or have a representative appear. Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai'i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, please call the Board at (808) 586-8616.

(8) NOTICE OF WITNESS REQUIREMENTS WHILE TESTIFYING REMOTELY

Due to the situation with COVID-19, unless otherwise ordered by the Board, all witnesses must testify videographically. Accordingly, the Board **orders all parties** to inform their witnesses that, unless otherwise directed or allowed, when the witness testifies:

1. The witness must be in a location without anyone else in the room with them, and there should be no one at the location who can overhear their testimony;

2. The device from which the witness appears must be used during the witness' testimony solely for the purpose of the witness appearing by video;
3. The witness may not consult with anyone during testimony;
4. The party calling the witness must ensure that the witness has access to all exhibits in the case;
5. The witness must not look at or make reference to notes or any other documents or materials other than the exhibits, and may look at the exhibits only when directed to do so by a party or the Board;
6. At all times while testifying, the witness must be clearly visible, face the camera, and speak directly and audibly into the microphone;
7. The witness may not use a virtual background; and
8. The witness must not have any communication with third parties while they are on the stand and under oath.

(9) NOTICE OF THE HEARING ON THE MERITS

NOTICE IS HEREBY GIVEN, pursuant to HRS §§ 377-9, 89-5(i)(3), (4), (5), and 89-14, and HAR §§ 12-42-46 and 12-42-49 that the Board will conduct an HOM on the instant Complaint at the place, time and date listed below and in the Schedule set forth below. The purpose of the HOM is to receive evidence and arguments on whether Respondent(s) committed prohibited practices as alleged by Complainant(s).

DATE AND TIME: January 12, 2021 at 9:00 a.m.

LOCATION: Remote Zoom Hearing

Subject to the Board's discretion due to the Extraordinary Circumstances listed above in Section 2, all parties have the right to appear at the Hearing on the Merits and to be represented by counsel or any other authorized person. **All parties, representatives, and witnesses must appear at the hearing on the merits.** Please note that this requirement may be altered due to the Extraordinary Circumstances listed above in Section 2 by Board Order.

Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai'i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, please call the Board at (808) 586-8616.

(10) **SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES**

<u>DATES AND DEADLINES</u>	<u>DATE</u>	<u>TIME</u>
<u>Prehearing Conference</u>	12/22/20	10:00 a.m.
<u>Dispositive Motion Deadline</u>	12/24/20	
<u>Response to Dispositive Motion Deadline</u>	1/4/21	
<u>Pretrial Statement; Exchange of Exhibits; Subpoena Deadline</u>	1/4/21	
<u>Pretrial Conference and Hearing on Dispositive Motions</u>	1/5/21	9:00 a.m.
<u>Hearing on the Merits</u>	1/12/21	9:00 a.m.

All submissions must be filed on or before 4:30 p.m. on the deadline date.

DATED: Honolulu, Hawai'i, _____ December 4, 2020 _____.

HAWAI'I LABOR RELATIONS BOARD



Marcus R. Oshiro

MARCUS R. OSHIRO, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

J.N. Musto

J.N. MUSTO, Member

Copies sent to:

Jonathan Spiker, Esq.

David Ige, Governor, State of Hawai'i

Elizabeth Char, Director, Department of Health

James Halvorson, Deputy Attorney General



EFiled: Dec 03 2020 02:08PM HAST
Transaction ID 66158371
Case No. 20-CE-10-953

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

FORM HLRB-4
PROHIBITED PRACTICE COMPLAINT

INSTRUCTIONS. Submit the original¹ of this Complaint to the Hawaii Labor Relations Board, 830 Punchbowl Street, Room 434, Honolulu, Hawaii 96813. If more space is required for any item, attach additional sheets, numbering each item accordingly.

1. The Complainant alleges that the following circumstances exist and requests that the Hawaii Labor Relations Board proceed pursuant to Hawaii Revised Statutes Sections 89-13 and 89-14 and its Administrative Rules, to determine whether there has been any violation of the Hawaii Revised Statutes, Chapter 89.
-

2. COMPLAINANT Please select one that describes the Complainant:

☐ Public Employee ☐ Public Employer ☒ Public Union (public employee organization)

- a. Name, address and telephone number.

United Public Workers, AFSCME, Local 646, AFL-CIO
1426 North School Street
Honolulu, Hawaii 96817
808-847-2631

-
- b. Name, address, e-mail address and telephone number of the principal representative, if any, to whom correspondence is to be directed.

Jonathan E. Spiker
Koshiba Price & Gruebner
707 Richards Street, Suite 610
Honolulu, Hawaii 96813
Phone: 808-523-3900
Fax: 808-526-9829
jspiker@koshibalaw.com

¹ Notwithstanding Board rule 12-42-42(b), the Board only requires the original of the complaint.

3. RESPONDENT Please select one that describes the Respondent:

☐ Public Employee ☒ Public Employer ☐ Public Union (public employee organization)

a. Name, address and telephone number.

David Ige	Elizabeth Char
Governor, State of Hawaii	Director of Health
Executive Chambers	Department of Health, State of Hawaii
State Capitol	1250 Punchbowl Street
Honolulu, HI 96813	Honolulu, HI 96813
808-586-0034	808-586-4400

b. Name, address and telephone number of the principal representative, if any, to whom correspondence is to be directed.

Clare E. Connors, Attorney General
James Halvorson, Supervising Deputy Attorney General
Department of the Attorney General, State of Hawaii
235 S. Beretania Street, 15th Floor
Honolulu, HI 96813
808-587-2900

4. Indicate the appropriate bargaining unit(s) of employee(s) involved.

Bargaining Unit 10 – Institutional, health and correctional workers

5. ALLEGATIONS

The Complainant alleges that the above-named respondent(s) has (have) engaged in or is (are) engaging in a prohibited practice or practices within the meaning of the Hawaii Revised Statutes, Section 89-13. (Specify in detail the particular alleged violation, including the subsection or subsections of the Hawaii Revised Statutes, Section 89-13, alleged to have been violated, together with a complete statement of the facts supporting the complaint, including specific facts as to names, dates, times, and places involved in the acts alleged to be improper.)

Complainant alleges violations of Hawaii Revised Statutes Sections 89-13(a)(1)-(5), (7), and (8), as alleged in Attached.

(See Attached).

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6. Provide a clear and concise statement of any other relevant facts.
See Attached.

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

DECLARATION IN LIEU OF AFFIDAVIT

(If the Complainant is self-represented, then the Complainant must sign this Declaration).

Please select one:

- ☐ the Complainant
☒ the Complainant's principle representative
☐ the person described below

I, Jonathan E. Spiker,
do declare under penalty of law that the foregoing is true and correct.

Date: December 3, 2020

/s/ Jonathan E. Spiker

The person signing above agrees that by signing his or her name in the above space with a "/s/ first, middle, last names" is deemed to be treated like an original signature.

jspiker@koshibalaw.com

Signor's email address

If you are not the Complainant or listed as the principle representative in #2(b) and you are signing above, then please complete the contact information below.

Your address:

Your phone number: _____

Your relationship to the Complainant:

If the Complainant or principal representative is registered with File and ServeXpress (FSX), then you may proceed to electronically file this complaint.

If the Complainant or the principal representative is not registered with FSX and would like to electronically file this complaint through FSX, then complete the Board Agreement to E-File, FORM HLRB-25. (Form HLRB-25 is on the HLRB Website at labor.hawaii.gov/hlrb/forms.) Email the completed form to the Board at dlir.laborboard@hawaii.gov.



KOSHIBA PRICE & GRUEBNER
Attorneys at Law, A Law Corporation

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Case No. 20-CE-10-953

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jspiker@koshibalaw.com

Attorneys for Complainant
UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
Local 646, AFL-CIO,

Complainant,

vs.

DAVID IGE, Governor, State of Hawaii;
ELIZABETH CHAR, Director of Health,
Department of Health, State of Hawaii,

Respondents.

HLRB NO. _____

PROHIBITED PRACTICE COMPLAINT

PROHIBITED PRACTICE COMPLAINT

Complainant United Public Workers, AFSCME, Local 646, AFL-CIO (“UPW” or
“Union”) complains against Respondents above-named, alleging as follows:

PARTIES

1. UPW is an employee organization and an exclusive bargaining representative within the meaning of Hawaii Revised Statutes (“HRS”) § 89-2.

2. UPW is the certified exclusive bargaining representative and collective bargaining agent for all Bargaining Unit 10 – Institutional, health and correctional workers (“BU-10”).

3. Respondent David Ige (“Governor Ige”) is the duly elected Governor of the State of Hawaii, and an employer or public employer as defined under HRS § 89-2 and under the applicable collective bargaining agreement (“CBA”).

4. Respondent Elizabeth Char (“Dr. Char”) is the Director of Health of the Department of Health, State of Hawaii (“Department of Health”) and an employer or public employer as defined under HRS § 89-2 and under the applicable CBA.

5. The Hawaii State Hospital is a state-run psychiatric facility operated by the Department of Health.

6. Governor Ige, Dr. Char, and the Hawaii State Hospital are collectively referred to herein as “Respondents” or “Employer.”

HAWAII COLLECTIVE BARGAINING LAWS

7. The Hawaii Labor Relations Board (“HLRB” or “Board”) under HRS Chapter 89 has exclusive original jurisdiction to resolve controversies under that chapter.

8. Under HRS § 89-14, the HLRB has “exclusive original jurisdiction over any controversy concerning prohibited practices.” *See In re United Pub. Workers, AFSCME, Local 646, AFL-CIO, Union*, 131 Haw. 142, 144, 315 P.3d 768, 770 (Ct. App. 2013), *as corrected* (Feb. 21, 2014).

9. In addition to declaratory relief, the HLRB has further been delegated with broad authority and jurisdiction to adjudicate prohibited practice complaints in their entirety. HRS § 89-5(i)(4) provides that the Board's powers and functions include the authority to "Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper[.]" HRS § 89-5(i)(4); *In re Hawaii Gov't Emps. Ass'n, Local 152*, 116 Haw. 73, 97, 170 P.3d 324, 348 (2007) ("The legislature delegated to the HLRB exclusive original jurisdiction over controversies surrounding prohibited practices including 'those powers which are reasonably necessary' to make its jurisdiction effective.").

10. The Hawaii Intermediate Court of Appeals ("ICA") has explained:

... the Board had jurisdiction to declare whether the particular action presented in the petition might constitute a prohibited practice, because the Board has the authority to take action with respect to prohibited practices. While noting the limited effect of such a ruling, the supreme court viewed this action as being within the jurisdiction of the Board, **regardless of whether the same question was or was not subject to arbitration, and regardless of whether the Board's ruling might or might not have been significant to the outcome of the arbitration.**

In re United Pub. Workers, supra, 131 Haw. at 152, 315 P.3d at 778 (emphasis added).

11. The Hawaii Supreme Court has held:

The willful failure of an employer to observe the terms of a collective bargaining agreement is defined by § 89-13(a)(8) as a prohibited practice, with respect to which § 89-5(b)(4) empowers the Board, upon complaints by employers, employees and employee organizations, to "take such actions with respect thereto as it deems necessary and proper." Since the meaning and effect of a provision of a collective bargaining agreement must be determined by the Board in the course of determining whether an employer is in violation of the agreement and is engaging in a prohibited practice, the meaning and effect of the agreement between C&C and UPW was a question which related to an action which the Board might take in the exercise of its powers.

...

The declaratory ruling granted upon C&C's petition, therefore, expressed the Board's opinion that a violation of the seniority clause of the agreement by C&C would constitute a prohibited practice under § 89-13. **We think it is not arguable that any collective bargaining agreement could deprive the Board of its statutory authority to take action with respect to prohibited practices, although the terms of existing agreements might well be relevant to the determination whether a prohibited practice existed.** If the Board had jurisdiction to take action with respect to a prohibited practice, **it had jurisdiction to declare what would constitute a prohibited practice.** The arguments advanced with respect to the effect of the arbitration provision, therefore, were for the consideration of the Board in arriving at its ruling and were not relevant to the question whether the Board had jurisdiction of C&C's petition.

Fasi v. State Pub. Employment Relations Bd., 60 Haw. 436, 443-45, 591 P.2d 113, 117-118 (1979)

(emphasis added).

12. Furthermore:

...the HLRB had jurisdiction to declare whether the factual circumstances presented to it on the ... Amended Petition would constitute a prohibited practice. As the supreme court observed in *Fasi*, any effect of such a ruling is necessarily limited to those particular factual circumstances, and **the HLRB's jurisdiction to decide whether a particular action constitutes a prohibited practice is not affected by the fact that the propriety of the same underlying action might also be decided in an arbitration or other forum.** *Fasi*, 60 Haw. at 445, 591 P.2d at 118.

In re United Pub. Workers, 131 Haw. at 152-53, 315 P.3d at 778-79 (emphasis added).

13. This is a complaint for prohibited practices for willful violations of HRS § 89-13(a)(1)-(5), (7) and (8), in connection with Respondents unilateral acts and conduct as described herein.

14. HRS Chapter 89 sets forth the public policies underlying collective bargaining in the public sector. HRS Chapter 89, Section 2 defines "collective bargaining" as:

"Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive representative **to meet at reasonable times to confer and negotiate in good faith**, and to execute a written agreement **with respect to wages, hours**, amounts of contributions

by the State and counties to the Hawaii public employees health fund, **and other terms and conditions of employment**, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession. HRS § 89-2 (emphasis added).

COLLECTIVE BARGAINING AGREEMENT

15. UPW and Respondents are parties to the CBA, which contains various contracted terms and agreements.

16. Section 1.05 of the CBA provides:

The Employer shall consult the Union when formulating and implementing personnel policies, practices and any matter affecting working conditions. No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent.

17. Section 14.01 of the CBA provides:

Nothing in this Agreement shall be construed as abridging, amending or waiving any rights, benefits or perquisites presently covered by constitutions, statutes or rules and regulations that Employees have enjoyed heretofore, except as expressly superseded by this Agreement.

18. Pursuant to Section 46 of the CBA, “workplace safety is of mutual concern to the Employer and the Union,” and “[t]he Employer shall comply with applicable Federal, State, or Local safety laws, rules and regulations (e.g., Chapter 12-205, Hawaii Administrative Rules, pertaining to protective clothing, shoes and accessories), including the Hawaii Workers Compensation Law.”

SUBJECT INCIDENTS

19. On September 4, 2020, without notice or consultation to UPW, the Hawaii State Hospital held its first mandatory coronavirus disease 2019 (“COVID-19”) training session. Six (6) BU-10 employees attended the session. Employees were told they must attend the training session.

20. On September 8, 2020, UPW became aware that the Hawaii State Hospital was conducting mandatory COVID-19 training for all BU-10 employees. The mandatory COVID-19 training is eight (8) hours and conducted twice a week. The mandatory COVID-19 training is identical to previously conducted infectious disease training given to all employees.

21. Requiring an employee to attend mandatory COVID-19 training violates the CBA and results in a change to personnel policies, practices and matters affecting working conditions without consultation and mutual consent with UPW.

22. Once a BU-10 employee completes the mandatory COVID-19 training, the employee is deemed “certified” to handle and work with COVID-19 infected patients and assigned to the Hawaii State Hospital’s COVID-19 Unit.

23. Once assigned to the COVID-19 Unit, a BU-10 employee’s job duties are changed and different from the job duties in the employee’s job description. This violates the CBA and results in a change to personnel policies, practices and matters affecting working conditions without consultation and mutual consent with UPW.

24. Despite a demand to cease and desist the current practice of mandatory COVID-19 training, the Hawaii State Hospital continues to conduct mandatory COVID-19 training twice a week.

25. Despite a demand to cease and desist the current practice of changing the job duties of BU-10 employees assigned to the COVID-19 Unit, the Hawaii State Hospital continues to change the job duties of these employees assigned to the COVID-19 Unit.

26. The Hawaii State Hospital requires every employee to be tested for COVID-19 at the workplace, prior to the start of the employee’s work shift. For example, if an employee

works Monday through Friday, the employee must be tested for COVID-19 at the workplace on each of those days in order to be allowed to work.

27. Any employee that refuses or declines COVID-19 testing is prohibited from working and required to use vacation time or sick leave to account for their work time.

28. Requiring employees to be tested for COVID-19 in order to be allowed to work violates the CBA and results in a change to personnel policies, practices and matters affecting working conditions without consultation and mutual consent with UPW.

29. Prohibiting employees from working unless they are tested for COVID-19 or otherwise requiring them to use vacation time or sick leave to account for their work time violates the CBA and results in a change to personnel policies, practices and matters affecting working conditions without consultation and mutual consent with UPW.

30. Despite repeated requests for consultation, Respondents refuse to meet and discuss with UPW the changes in personnel policies, practices and matters affecting working conditions.

31. Respondents cannot unilaterally impose changes in working conditions and circumvent the constitutionally protected collective bargaining process. Respondents actions and conduct as described herein affects the terms and conditions of employment and, therefore, are a mandatory subject of collective bargaining negotiation protected by Article XIII, Section 2 of the Hawaii State Constitution and as prescribed by HRS § 89. Respondents do not have any express or implied right to unilaterally impose changes in working conditions.

32. HRS § 89-9(a), requires an Employer to bargain in good faith over wages, hours, and other terms and conditions of employment.

33. The CBA does not allow Respondents to unilaterally implement new personnel policies, practices and any matter affecting working conditions and specifically provides that:

The Employer shall consult the Union when formulating and implementing personnel policies, practices and any matter affecting working conditions. No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent.

34. Respondents violated Sections 1.05, 14.01 and 46 of the CBA by forcing BU-10 members to attend mandatory COVID-19 training, assigning these employees to the COVID-19 Unit, changing these employees' job duties from that of their job description, requiring employees to undergo COVID-19 testing in order to be allowed to work, and requiring employees that refuse or decline COVID-19 testing to use vacation time or sick leave to account for work time.

35. The terms of the CBA remain in force and cannot be unilaterally changed.

36. Respondents actions as described herein are evidence of willful and blatant conduct and such actions constitute a violation of HRS § 89-13(a)(1)-(5), (7), and (8).

37. Respondents' conduct and actions as described herein constitute prohibited practices pursuant to HRS § 89-13, and willfully and intentionally violated the terms of the CBA and the rights of BU-10 employees.

38. Respondents' willful and blatant conduct and actions constitute violations of HRS § 89-13(a)(1)-(5), (7) and (8), including but not limited to interfering, restraining and coercing BU-10 employees from exercising their guaranteed rights under HRS § 89, dominating and interfering with the existence of the Union's organization, discriminating in regards to the terms and conditions of employment tenure and because the affected BU-10 employees are members of UPW, and putting the affected BU-10 employees health and safety at risk.

39. Respondents unilateral actions are a violation of the constitutionally protected collective bargaining rights embodied within Hawaii Constitution, Article XIII, Section 2.

40. UPW requests, and is entitled to receive, a declaratory judgment that Respondents cannot continue to unilaterally impose and require mandatory COVID-19 training for BU-10 employees and then assign the employees to the COVID-19 Unit and change the job duties of the employees.

41. UPW requests, and is entitled to receive, a declaratory judgment that Respondents cannot continue to unilaterally impose and require COVID-19 testing for BU-10 employees prior to starting work and require that employees that refuse or decline to participate in COVID-19 testing are prohibited from working and must expend their vacation time or sick leave to account for their work time.

42. UPW requests, and is entitled to receive in order to avoid irreparable harm, a preliminary and permanent injunction from this Board enjoining Respondents from continuing to unilaterally impose and require mandatory COVID-19 training for BU-10 employees and then assign the employees to the COVID-19 Unit and change the job duties of the employees.

43. UPW requests, and is entitled to receive in order to avoid irreparable harm, a preliminary and permanent injunction from this Board enjoining Respondents from continuing to unilaterally impose and require COVID-19 testing for BU-10 employees prior to starting work and require that employees that refuse or decline to participate in COVID-19 testing are prohibited from working and must expend their vacation time or sick leave to account for their work time.

WHEREFORE, UPW prays as follows:

A. That an order issue from the Board finding that Respondents have committed prohibited practices pursuant to HRS § 89-13(a)(1)-(5), (7) and (8);

B. That the Board issue a declaratory judgment that Respondents' cannot continue to unilaterally impose and require mandatory COVID-19 training for BU-10 employees and then assign the employees to the COVID-19 Unit and change the job duties of the employees.

C. That the Board issue a declaratory judgment that Respondents cannot continue to unilaterally impose and require COVID-19 testing for BU-10 employees prior to starting work and require that employees that refuse or decline to participate in COVID-19 testing are prohibited from working and must expend their vacation time or sick leave to account for their work time.

D. That the Board issue a preliminary and permanent injunction enjoining Respondents from continuing to unilaterally impose and require mandatory COVID-19 training for BU-10 employees and then assign the employees to the COVID-19 Unit and change the job duties of the employees.

E. That the Board issue a preliminary and permanent injunction enjoining Respondents from continuing to unilaterally impose and require COVID-19 testing for BU-10 employees prior to starting work and require that employees that refuse or decline to participate in COVID-19 testing are prohibited from working and must expend their vacation time or sick leave to account for their work time.

F. That the Board award UPW its attorneys' fees and costs of suit.

G. That the Board award such other and further relief as is just and equitable under the circumstances.

DATED: Honolulu, Hawaii; December 3, 2020.

/s/ Jonathan E. Spiker
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UNITED PUBLIC WORKERS, AFSCME,
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